STATE OF MICHIGAN

COURT OF APPEALS

DARLENE K. HAGEL,

Plaintiff-Appellant,

v

PAMPA LANES, INC.,

Defendant-Appellee.

UNPUBLISHED
January 24, 2006

No. 262136
Macomb Circuit Court
LC No. 04-000382-NO

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition, pursuant to MCR 2.116(C)(10), in favor of defendant in this premises liability case. Because plaintiff failed to show the existence of a genuine issue of material fact regarding whether defendant had actual or constructive knowledge of gum on the bowling approach, the trial court properly granted summary disposition in favor of defendant, and we affirm.

This premises liability case involves a slip and fall that occurred at defendant's bowling center. On appeal, plaintiff argues that the trial court erred in granting defendant summary disposition under MCR 2.116(C)(10) because, in a light most favorable to plaintiff, there was a genuine issue of material fact regarding whether defendant had actual or constructive notice of gum on the approach of a bowling lane. A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in a light most favorable to the party opposing the motion. MCR 2.116(G)(5); *Anderson v Pine Knob Ski Resort, Inc*, 469 Mich 20, 33; 664 NW2d 756 (2004) (*Cavanagh, J., dissenting*). A trial court may grant a motion for summary disposition only when the affidavits or other documentary evidence show that there is no genuine issue regarding any material fact. *Id.*, pp 33-34. This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998), after rem 469 Mich 487 (2003). Review is limited solely to the evidence that had been presented to the trial court at the time the motion was decided. *Pena v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

It is well established that a possessor of land is not an absolute insurer of the safety of an invitee. *Anderson v Wiegand*, 223 Mich App 549, 554; 567 NW2d 452 (1997). An invitor owes an invitee a duty to inspect the premises and make any necessary repairs or warn of discovered hazards. *James v Alberts*, 464 Mich 12, 19-20; 626 NW2d 158 (2001). An invitor's liability must arise from active negligence, through an omission or unreasonable act, or through a condition of which the invitor knew or a condition of such a character or duration that the invitor should have known about it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001), after rem 249 Mich App 141 (2002). Whether an invitor owes a duty to an invitee depends on whether the invitor had actual or constructive notice of the hazardous condition. *Id*.

It is undisputed that plaintiff was a business invitee on defendant's premises and that neither defendant nor its employees created the alleged hazard. Plaintiff only claims that she presented sufficient evidence to allow a jury to infer that defendant had actual or constructive notice of the gum on the approach. Plaintiff specifically contends that the affidavit of defendant's manager on duty at the time of plaintiff's fall, Jac Hilgendorf, is not admissible as an "affidavit" because it is not notarized, and, is inadmissible hearsay under MRE 802 because it is not based on personal knowledge. Although Hilgendorf's affidavit complies with the requirements of MCR 2.119(B)(1) and is not comprised of inadmissible hearsay, because the affidavit was not notarized, it is inadmissible. MCR 2.113(A) provides that an affidavit must be verified by oath or affirmation. It therefore follows that the affiant must make his statement before a person capable of administering an oath or affirmation, i.e. a notary. *Detroit Leasing Co v City of Detroit*, (Docket No. 261006, released December 13. 2005) Since the affidavit is not properly notarized, the trial court should not have considered it. This error is harmless because as is displayed *infra*, wholly exclusive of Hilgendorf's statement, plaintiff has not presented sufficient evidence that a genuine issue of material fact exists regarding defendant's notice of the alleged hazard.

Next, plaintiff submits that the trial court erred in considering Chasta White's deposition testimony in lieu of her affidavit, which allegedly establishes defendant's actual notice. White averred in her affidavit that when she and plaintiff told defendant's employee, "Ed," about the incident, "Ed" responded, "those damn kids left the gum their [sic] and we were going to clean it up, we just didn't get to in time, sorry." In her deposition, however, White contradicted her affidavit when she stated that Ed did not know the alleged hazard was on the approach and that Ed did not have actual notice of the alleged hazard prior to plaintiff's fall. Given White's contradictory deposition testimony, plaintiff may not rely on White's affidavit to establish the existence of a genuine issue of material fact regarding the issue of actual notice. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 478-480; 633 NW2d 440 (2001).[1]

Plaintiff also maintains that because the entire transcript of White's deposition was not "filed" until after the March 24, 2005 summary disposition ruling, that the portion of White's deposition not attached to defendant's reply should have been excluded. MCR 2.116(G)(5)

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[1] Filing an affidavit before or after deposition testimony "is not a meaningful distinction and the same rationale applies." *Dykes, supra*, p 481.

allows the trial court to consider evidence "then filed" or "submitted by the parties." The record reflects that pursuant to the trial court's request at the January 24, 2005 hearing, defendant's counsel submitted White's entire deposition transcript directly to the court on January 25, 2005. The trial court did not err in considering White's entire deposition transcript because the trial court received it before its March 24, 2005 summary disposition ruling.

Next, plaintiff argues that even without White's affidavit, White's deposition testimony was sufficient to create an issue of material fact regarding defendant's constructive notice. Constructive notice requires that the hazard existed long enough that defendant should have known of it. *Clark*, *supra*, p 419. White testified in her deposition that she did not see the children stop bowling on the day of the incident, but she assumed, based on one prior experience at the bowling center when the children's league ended, that they stopped bowling 30 to 45 minutes before plaintiff fell. Plaintiff testified in her deposition that, based only from her experience of having four children, the gum looked like it had been there for at least a half hour.

After reviewing the record, it is clear that plaintiff proffered no evidence showing how and when the gum landed on the approach. Plaintiff has provided no direct evidence that one of the children from the earlier bowling league dropped the gum on the approach or that the previous league ended 30 to 45 minutes before plaintiff's league. Although constructive notice of a hazardous condition can be supported by reasonable inferences drawn from the evidence, such inferences must amount to more than mere speculation or conjecture. See *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 9; 279 NW2d 318 (1979). Plaintiff did not present any evidence that she and White had actual knowledge regarding the timing of the event prior to her fall. White's and plaintiff's testimony regarding how and when the hazard occurred amounts only to mere conjecture, and thus, summary disposition was appropriate. *Id.*, p 9.[2]

Plaintiff relies on *Andrews v K Mart Corp*, 181 Mich App 666; 450 NW2d 27 (1989), to argue that White's deposition testimony regarding the history of food spillage before plaintiff's league gives rise to constructive notice of the hazard. In *Andrews***,** the plaintiff allegedly slipped and fell on a rug as she was leaving the defendant's store in wintertime. *Id*., p 667. Noting that a store employee had testified at deposition that the rugs used by the store had a tendency to curl up in the wintertime, and were thus routinely replaced by the store with fresh rugs, this Court held that a reasonable inference of constructive notice of the hazard was presented. *Id*., pp 671-672. The instant case is readily distinguishable from *Andrews* because the evidence in *Andrews* shows a routine rug problem, whereas here, White's deposition testimony shows that food spillage was *not* a weekly occurrence. Also, *Andrews* involved knowledge of a specific problem with a specific item at a specific location in the defendant's store, and here, the matter involves

[2] Plaintiff appears to argue that the trial court improperly based its ruling on the credibility of plaintiff's testimony. Plaintiff points to the trial court's statement, "[t]he fact that the league usually may have ended 30-45 minutes before plaintiff's league is not dispositive." However, a review of the record shows that the trial court considered plaintiff's deposition testimony and properly concluded that her deposition testimony was not dispositive regarding how long the gum was in the alley because it was "speculation and conjecture."

knowledge of an unspecific food spillage over an indefinite location, i.e. the entire floor of defendant's bowling center. *Id*. *Andrews* being dissimilar, plaintiff's argument fails.

Finally, plaintiff argues that the facts illustrate the gum was dirty, hairy, and stretched out provide enough evidence for a jury to infer that defendant had constructive notice of the hazard. A review of the record reveals that plaintiff admitted in her deposition that she could not see the gum before she fell because it blended in with the dark lines on the floor. Plaintiff also testified that the spot was about the size of a quarter. Robin Massi's affidavit confirmed that there was no visible hazard on the approach prior to plaintiff's fall. White also testified that the spot, which was the size of a quarter, was not visible before plaintiff fell and that she had to feel the area to find the "sticky stuff." Given the evidence presented, the trial court did not err in finding that defendant could not be charged with notice of the hazard.

In sum, we conclude that the trial court appropriately viewed all the evidence in the light most favorable to plaintiff and ruled as a matter of law that plaintiff failed to create a genuine issue of material fact that defendant had actual or constructive knowledge of the gum on the approach. Consequently, the trial court properly summary disposition in favor of defendant. *Morales, supra*, p 294.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Alton T. Davis